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No. 90-659

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEITH R. GOLLUST, PAUL E. TIERNEY, JR., AUGUSTUS K. OLIVER, GOLLUST, TIERNEY AND OLIVER, GOLLUST & TIERNEY, INC., CONISTON PARTNERS, CONISTON INSTITUTIONAL INVESTORS, BAKER STREET PARTNERS, WJB ASSOCIATES and HELSTON INVESTMENT INC.,

Petitioners,

—v.—

IRA L. MENDELL, in behalf of Viacom Inc. and, alternatively, Viacom International Inc.,

Respondents.

BRIEF FOR RESPONDENT MENDELL IN OPPOSITION

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QUESTION PRESENTED

Whether a shareholder loses his standing under 16(b) where (1) the shareholder commenced his 16(b) action on behalf of the issuer months before the business restructuring in question, (2) in such restructuring, the issuer became the wholly owned subsidiary of a parent corporation, which was a shell corporation formed for the purpose of acquiring the issuer, with the issuer being the parent corporation's only asset, and (3) as a result of such restructuring, the shareholder exchanged his stock in the issuer for cash and stock of the parent corporation so that the shareholder has a continuing financial interest in the 16(b) action?

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COUNTER-STATEMENT OF THE CASE

The facts are fully set forth in the Second Circuit's opinion herein (909 F.2d 724).

The original complaint, filed on January 6, 1987, was brought in behalf of Viacom International, Inc. ("International"), whose stock had been listed and traded on the New York Stock Exchange, to recover short-swing profits made in violation of 16(b) against the defendants herein (other than the nominal defendants, International and Viacom, Inc.) (Id., at 725-6). As the result of a business restructuring that occurred on or about June 3, 1987 ("restructuring"), International became the wholly owned subsidiary of Viacom, Inc. ("Viacom") (Id. at 726).

As a further result of the restructuring, the shareholders of International received cash and also 17% of the common and preferred stock of Viacom (Ibid.). The common and preferred

stock of Viacom are listed and traded on the American Stock Exchange.

Prior to the restructuring, Viacom was a shell corporation incorporated for the purpose of acquiring International (Ibid.). The only significant asset of Viacom is International (Ibid.). A subsidiary of Viacom merged into International, which thereby became the wholly owned subsidiary of Viacom (Ibid.).

As a result of the restructuring, plaintiff herein is now a shareholder of Viacom (Ibid.).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN DECISIONS

Petitioners predicate their petition upon a claimed conflict between the decision herein by the Second Circuit and the decisions in Portnoy v. Kawecki Berylco Inds., 607 F.2d 765 (7th Cir. 1979) (2-1 decision) and Lewis v. McAdam, 762 F.2d 800 (9th Cir. 1985) (per curiam). There is no basis for petitioners' claims of a conflict.

Unlike here, in neither Portnoy nor Lewis was the plaintiff ever a shareholder of the issuer.

In Portnoy, the initial issuer, whose shareholders were cashed out, became the subsidiary (second tier subsidiary) of he first tier subsidiary of a public corporation. Plaintiff therein was a

shareholder of the public grandparent.

Similarly, in Lewis, the initial issuer, whose shareholders were also cashed out, ceased to exist upon its merger into the subsidiary of a parent corporation. Plaintiff therein was a shareholder of the public parent corporation.

The Second Circuit in its opinion herein appropriately distinguished Portnoy and Lewis as follows (Id. at 730-1):

> "Contrary decisions of our sister circuits are similarly distinguishable. See Lewis, 762 F.2d at 801 (plaintiff shareholder of parent but never held stock in the issuer or its surviving subsidiary); Portnoy, 607 F.2d at 767-68 (cashout merger left plaintiff with no continuing financial interest in the litigation; plaintiff's alternative status as a shareholder in the grandparent corporation gave no standing for §16(b) suit on behalf of the issuer). In the case at bar, the conversion of International stock

> into Viacom stock presents a novel situation where former shareholders have a continuing interest in maintaining suit in behalf of the issuer. We conclude, therefore, that under those unique circumstances the cases cited by defendants are neither controlling nor persuasive."

Nor is there any intra-Circuit conflict with Untermeyer v. Valhi, Inc., 665 F. Supp. 297 (S.D.N.Y. 1987), aff'd mem., 841 F.2d 1117 (2d Cir. 1988), aff'd on reh'g, 841 F.2d 25 (2d Cir. 1988), cert. denied 109 S.Ct. 175, or with Rothenberg v. United Brands Co., [1977-78 Transfer Binder] Fed. Sec. L. Rept. (CCH) ¶ 96,045 at 91,690 (S.D.N.Y. 1977) aff'd mem., 573 F.2d 1295 (2d Cir. 1977), as claimed by petitioners.

Since Judge Cardamone authored the opinion of the Second Circuit herein and was also a member of the panel in Untermeyer, petitioners' claim of a

conflict with Untermeyer requires Judge Cardamone to have been in conflict with himself. There is no basis for imputing to Judge Cardamone any such basic self-contradiction.

In Untermeyer, the shareholders of the initial issuer (Sea-land) were cashed out by another public corporation (CSX) and Sea-Land became the wholly owned subsidiary of CSX. Both Sea-Land and CSX had been totally separate and independent companies and the common stock of both Sea-Land and CSX had been listed and separately traded on the New York Stock Exchange.

The opinion herein thus distinguished Untermeyer, as follows (Id. at 730):

> "[Untermeyer]...dealt with a plaintiff who owned stock of the parent corporation, but who never owned stock of the company that issued the shares traded in contravention of §16(b). 665 F. Supp. at 298. Thus, even without

> a merger, the Untermeyer plaintiff would not have had standing. In contrast, plaintiff here brought a valid §16(b) suit while he was a current shareholder of the issuer, and but for the merger standing would not be in issue here." (emphasis in original)

Finally, respecting Rothenberg, the Second Circuit in its opinion herein also appropriately distinguished that decision (Id. at 730):

> "In Rothenberg v. United Brands Co., also cited by the district court, the shareholders received cash in the merger instead of securities. The crucial factor considered by the trial court was that in a cashout merger the former shareholders maintain no continuing financial interest in the litigation. See Rothenberg, [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,045 at 91,692. In the present case all former International shareholders obtained, as a result of the merger, shares of International's parent corporation, and plaintiff, as one of them, continues to have at least an indirect financial interest in the outcome of this lawsuit. Two additional reasons caution against an overbroad application

> of Rothenberg: That decision noted that even if plaintiff had standing the §16(b) claim failed on the merits, see id. at 91,693-94; and the court's standing analysis was premised on an analogous application of Rule 23.1 which, as noted above, does not govern shareholders bringing §16(b) claims. Id. at 91,691-92."

This case involves a unique set of facts so that there is no basis for petitioners' claim of a conflict in decisions.

II. THIS CASE INVOLVES A UNIQUE AND NON-RECURRENT SET OF FACTS AND HAS BEEN CORRECTED DECIDED

The Second Circuit explicitly referred in its opinion herein to the "novel situation" and "unique circumstances" of this case (Id. at 730, 731). No other case involves the situation where, as here, the restructuring in question occurred during

the pendency of a properly brought 16(b) action and the former shareholders of the issuer received in the restructuring stock of the parent (a shell corporation formed to acquire the issuer which became the parent's only asset) so that the former shareholders of the issuer have a continuing interest in maintaining A 16(b) suit in behalf of the issuer.

This singularly unique case therefore does not present any significant federal question which calls for this Court to grant certiorari.

The Second Circuit properly held, in this distinctive case, that the threshold procedural question of standing under 16(b), as distinguished from questions of substantive liability under 16(b), should be "determined by whether the policy behind the statute is best served by

allowing the claim." (Id. at 729) and that the broad meaning of the statutory language ("owner" of securities which language is not modified by any limiting expression) "better accords with the remedial purpose of the statute." (Id. at 730).

A long and unbroken line of decisions liberalizes procedural requirements in 16(b) cases. As stated by Judge Irving Kaufman in Epstein v. Shindler, 26 F.R.D. 176, 178 (S.D.N.Y. 1960), in disallowing a counterclaim against the issuer in a 16(b) action: "'it is plain ... that it [16(b)] was primarily intended as an instrument of a statutory policy of which the general public is the ultimate beneficiary. Congress did not intend procedural restrictions to hamper such policy.'",

quoting from Benisch v. Cameron, 81 F. Supp. 882, 884 (S.D.N.Y. 1948).

See, also, Blau v. Mission Corp., 212 F.2d 77, 79 (2d Cir. 1954), cert. denied, 347 U.S. 1016 (after-acquired shareholder may sue under 16(b) and requirements of Rule 23.1 in a derivative action that the complaint allege that "the plaintiff was a shareholder ... at the time of the transaction of which he complains" is inapplicable in 16(b) action); Magida v. Continental Can Co., 231 F.2d 843, 847-848 (2d Cir. 1956), cert. denied, 351 U.S. 972 (fact that there may be champertous relationship between plaintiff and his attorney is not a defense to a 16(b) action); Park & Tilford, Inc. v. Schulte, 160 F.2d 984, 988 (2d Cir. 1947), cert. denied, 332 U.S. 761 (if issuer does sue under 16(b),

intervention is freely granted to a shareholder "to guard against even the appearance of any concerted action"); Pellegrino v. Nesbit, 203 F.2d 463, 467 (9th Cir. 1953) ("any stockholder has a right to institute 16(b) suit if the corporation fails to do so, regardless of the good faith or reasonable business judgment of the board of directors."); Prager v. Sylvestri, 449 F. Supp. 425, 429 (S.D.N.Y. 1978) (demand requirement of 16(b) exists only for benefit of the issuer, so that the defendant insider does not have standing to assert lack of demand as a defense).

As stated by the Second Circuit herein: "A §16(b) plaintiff performs a public rather than a private function and is seen as an instrument for advancing legislative policy." (Id. at 728) In

this regard, the Second Circuit further stated: "we cannot help but note that the incorporation of Viacom and the merger proposed occurred after plaintiff's §16(b) claim was instituted. Hence, the danger of such intentional restructuring to defeat the enforcement mechanism incorporated in the statute is clearly present." (Id. at 731)

Finally, the SEC submitted an amicus brief below that supported the standing of respondent Mendell under 16(b) in this case. The decision of the Second Circuit herein thus has the support of the SEC.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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